No. 80570-9

SANDERS, J. (dissenting)—The majority claims the sexually violent predator (SVP) statute "authorizes a prefiling psychological examination," majority at 5; however John Strand is not entitled to representation at his examination notwithstanding former RCW 71.09.050 (1995), which guarantees the right to an attorney "[a]t all stages of the proceedings under this chapter . . . ."

The majority opines, in circular fashion, there is no right to a voluntariness hearing in a "voluntary prefiling psychological interview." Majority at 12. And because this is a "civil" incarceration, rather than a "criminal" one, we need not be concerned this man's right to due process was violated in connection with his loss of liberty.

I could not disagree more.

Because this statute provides for indefinite incarceration, a

massive curtailment of liberty by any standard, we must construe it strictly against the government and liberally in favor of the prisoner. *In re Det. of Martin*, 163 Wn.2d 501, 508, 182 P.3d 951 (2008). The majority does anything but.

At the heart of this case is a mental health evaluation conducted "pursuant to RCW 71.09" by Dr. Kathleen Longwell on January 5, 2004 over a year prior to the date the State actually filed and served a petition alleging Mr. Strand is a sexually violent predator. As recounted by the majority, this petition relied in large part on the prior mental health evaluation of Dr. Longwell. The majority then goes on to state:

> Prior to her evaluation of Strand, *Dr. Longwell* informed him that the interview was not confidential and that the information he volunteered to her could be used against him in an SVP commitment proceeding. Strand agreed to the evaluation and signed a consent form [which is not in the record].

Majority at 2 (emphasis added). I think the majority misreads the record. Apparently the majority is relying upon Dr. Longwell's written report, which begins:

> This evaluation is being completed pursuant to RCW 71.09, the sexually violent predator act, at the request of the Washington Department of Corrections (DOC). For the purpose of this evaluation Mr. Strand was asked if he would like to participate in a clinical interview by the undersigned. . . ., etc.

Clerk's Papers (CP) at 104. Apparently the majority is assuming that Dr. Longwell personally advised Strand of various things set forth on page 2 of the majority opinion; however the report does not say that. We do know, however, that Dr. Longwell maintains her office in Oakland, California, and it very well could have been that she traveled to the prison only after prison officials had assured her that Strand would participate in the interview and that he had been properly advised. Other than her hearsay report we don't know exactly what he was advised. The consent form he supposedly signed is strangely not in the record. However it *does* clearly appear he was *not* advised he had a right to consult an attorney prior to consenting to the interview much less to the presence of an attorney during the interview "pursuant to RCW 71.09. . . ." CP at 104. Whether Strand voluntarily consented was not challenged in the trial court, and the record is correspondingly sparse on this issue. Unfortunately the record does not include Strand's version of the events leading to the examination.

During the mental examination Longwell questioned Strand about several instances of alleged, but unadjudicated, sexual acts with other female victims. Strand denied committing each of the acts. However he did admit having nonsexual contact with the alleged female victims at the times and places

described. Based on this admission, which allegedly corroborated the women's stories, Longwell opined that Strand was a sexually violent predator. During the trial Strand sought to have these witnesses' testimony excluded as irrelevant. However the trial court admitted the testimony about the alleged, but unadjudicated, acts reasoning the acts were more likely than not to have been committed based largely on Strand's corroboration.[1]

The Attorney General attached a copy of Longwell's report to the probable cause petition.[2] On May 16, 2005, Strand stipulated that sufficient evidence, including Longwell's report, existed to support probable cause. Following a trial,

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[1] This court has not specifically decided whether ER 404(b) excludes testimony about alleged, but unadjudicated, "prior bad acts" in an SVP trial. *But see In re Det. of Turay*, 139 Wn.2d 379, 402, 986 P.2d 790 (1999) (holding ER 404(b) does not bar admission of testimony about prior bad acts because the bad acts are being used to demonstrate a person suffers from a mental abnormality and not that the defendant committed a specific "bad act."). However, for testimony of the prior bad act to be admissible, the testimony must be relevant. To be relevant the evidence must tend to show the prior alleged acts actually occurred. *See State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). The court here found the testimony relevant because Strand inadvertently corroborated the victims' allegations.

[2] Longwell's report claims that, "According to RCW 71.09, the danger posed by an individual and the basis for his or her judicial commitment is a mental abnormality that *predisposes* the individual to the commission of criminal sexual acts." CP at 112 (emphasis added). However the statute provides the mental abnormality must "*make*[] the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Former RCW 71.09.020(16) (2006) (emphasis added). Although Strand does not present the issue, Longwell clearly used the wrong standard in her assessment. The statute requires *more than a predisposition*; it requires the mental illness to *cause* the individual to act.

which included Longwell's testimony about her examination of Strand, a jury found Strand was an SVP. On February 6, 2006, Strand was committed indefinitely. Strand's attorney failed to object to the use of Longwell's report to support the probable cause determination or to object to the psychologist's testimony at trial about her examination of Strand.

Strand appealed his commitment to the Court of Appeals, Division Two, arguing the State had no authority to examine him until after the probable cause hearing, he was denied effective assistance of counsel, his statements were involuntary and therefore inadmissible, and the loss of a portion of trial testimony required reversal of his commitment. *In re Det. of Strand*, 139 Wn. App. 904, 162 P.3d 1195 (2007).

ANALYSIS

The SVP statute, chapter 71.09 RCW, allows for the indeterminate commitment of an individual who "has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Former RCW 71.09.020(16) (2006). If the State wishes to commit an individual under this chapter, it must "file a petition alleging that the person is a 'sexually violent predator' and stating

sufficient facts to support such allegation." Former RCW 71.09.030 (2008). Once the "probable cause determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator." Former RCW 71.09.040(4) (2001).

Strand argues the State failed to follow the proper procedures when it conducted a mental examination before the trial court held a probable cause hearing. He further argues this error was constitutional in magnitude and thus requires reversal notwithstanding his failure to object. The State argues the mental health evaluation was not erroneous because Strand consented to the examination. Strand also assigns error to the trial court's refusal to consider whether Strand's statements were voluntary before admitting them into evidence.

I. Dr. Longwell's evaluation of Strand was not authorized by statute and thus requires a new probable cause determination and trial

The SVP statute does not authorize the State to subject an individual to a mental examination prior to the probable cause hearing. To begin the commitment process, the State must file a petition alleging the individual is an SVP "stating sufficient facts to support such allegation." Former RCW 71.09.030. The individual is then entitled to a "hearing to contest probable cause" within 72 hours of the individual's being taken into custody on a judge's SVP determination. Former RCW 71.09.040(2). Once "the probable cause

determination is made, the judge shall direct that the person be transferred to an appropriate facility for an evaluation as to whether the person is a sexually violent predator." Former RCW 71.09.040(4). Under this provision the State has the right to conduct a mental health examination of the individual *following* the probable cause hearing. *See*, *e.g.*, *In re Det. of Williams*, 147 Wn.2d 476, 55 P.3d 597 (2002). At this mental health examination, the individual also has a statutory right to counsel. *See In re Det. of Kistenmacher*, 163 Wn.2d 166, 178 P.3d 949 (2008) (holding the plain language and the structure of the SVP act give a defendant a statutory right to counsel at a precommitment psychological examination). Strand was denied this right.

However, this case presents a different issue than either *Williams* or *Kistenmacher*. The question here is whether chapter 71.09 RCW authorizes the State to conduct a mental health examination of an individual as an SVP *prior to* the probable cause hearing *and then* use the results of that examination to establish probable cause. As Strand properly notes, there is no authorization for such an examination anywhere in chapter 71.09 RCW. Since we must limit the statute to its terms,[3] such an evaluation is not properly administered under the SVP statute.

[3] We strictly construe the SVP statute, limiting our inquiry to its terms. *Martin*, 163 Wn.2d at 508 (citing *In re Det. of Swanson*, 115 Wn.2d 21, 31, 804 P.2d 1 (1990)).

Furthermore, the larger context of the SVP commitment statute indicates there is no authorization for an evaluation prior to the probable cause hearing. The legislature included authorization for an evaluation *following* the probable cause hearing in former RCW 71.09.040(4). It also provides for annual evaluations *following* commitment in RCW 71.09.070. Using the statutory interpretation maxim expressio unius est exclusio alterius,[4] this can mean only there is no authorization to subject an individual to an evaluation except in these enumerated circumstances.

Moreover, as aforementioned, the State begins the SVP procedures by filing a commitment petition. Until the petition is filed, the individual is not subject to the provisions of the SVP statute. This would include any requirement to submit to a mental health examination. When Dr. Longwell prefaced her report that she was conducting her evaluation "pursuant to RCW 71.09," she misrepresented her legal authority to the court and probably to the prisoner as well.

The majority argues authorization for the evaluation is contained in former RCW 71.09.025(1)(b) (2008). Majority at 5-8. That statute requires the agency that refers the individual for petition as an SVP to "provide the prosecutor with

[4] "The expression of one thing is the exclusion of another." Black's Law Dictionary App. B at 1830 (9th ed. 2009).

all relevant information including . . . : (iii) [a]ll records relating to the psychological or psychiatric evaluation and/or treatment of the person; . . . . and (v) [a] current mental health evaluation or mental health records review." Former RCW 71.09.025(1)(b). However, this section merely requires the agency to forward all information it has to the petitioning prosecutor. It does not authorize the State to conduct its own mental examination pursuant to chapter 71.09 RCW. As we have previously held, "RCW 71.09.040 provides the exclusive means for obtaining mental examinations of civil commitment respondents." *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (citing *Williams*, 147 Wn.2d at 490-91). Since former RCW 71.09.040 provides the *exclusive* means for obtaining mental examinations in the civil commitment process, former RCW 71.09.025(1)(b) cannot provide another means to obtain such an evaluation, let alone provide authority to use the exam to establish probable cause.

II. The unauthorized mental evaluation violated Strand's due process rights including his right to counsel

Strand asserts the mental examination violated his due process rights including his right to counsel, his right to remain silent, and his right to privacy under article I, section 7 of the state constitution. "We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural

protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). "[I]f the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Id*. at 490-91 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)); *see also State ex rel. T.B. v. CPC Fairfax Hospital*, 129 Wn.2d 439, 452-53, 918 P.2d 497 (1996) (noting "'due process protections are necessary to insure [a] state-created right is not arbitrarily abrogated'" in civil commitment context (internal quotation marks omitted) (quoting *Vitek*, 445 U.S. at 489)).

The State's failure to follow the procedures mandated by the SVP statute deprived Strand of his liberty without due process of law. Individuals who are committed as SVPs are entitled to procedural due process protections. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 45, 857 P.2d 989 (1993) (citing *Jackson v. Indiana*, 406 U.S. 715, 724, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)). The "process due" an SVP petitioner is that process circumscribed by "the statute which authorizes civil incarceration." *Martin*, 163 Wn.2d at 511.

Under *Martin* any deviation from the procedures outlined in the SVP

statute is a violation of procedural due process. Here the State clearly deviated from the statutory procedures when it employed a psychologist to evaluate Strand before the probable cause hearing and then used that evaluation to prove probable cause. Thus, the mental health evaluation violated Strand's procedural due process rights.

The State also failed to follow the proper procedure when it deprived Strand of his statutory right to counsel at the precommitment mental examination. "We agree and conclude the plain language of the statute and the structure of the sexually violent predator act [gives the defendant] a statutory right to counsel at his precommitment psychological examination." *Kistenmacher*, 163 Wn.2d at 173. This was clearly a precommitment psychological exam, so Strand had a statutory right to counsel. Since the SVP statute affords prisoners a right to counsel, it was also a due process violation to deviate from procedure and deny Strand this right.

Even if the majority were correct that "[t]he SVP statute . . . authorizes a prefiling psychological examination," majority at 5, former RCW 71.09.050(1) guarantees:

> At all stages of the proceedings under this chapter, any person subject to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her.

Although I disagree that this examination was conducted pursuant to the statute, if it were, the prisoner would have "a statutory right to counsel at his precommitment psychological examination." *Kistenmacher*, 163 Wn.2d at 173. The majority can't have it both ways. If the prefiling examination was authorized by former RCW 71.09.025(1)(b)(v), it must therefore be subject to the statutory requirement of former RCW 71.09.050(1), which provides: "At *all* stages of the proceedings under this chapter, *any* person subject to this chapter shall be entitled to the assistance of counsel . . . ." (Emphasis added.)

The State violated Strand's due process rights twice when it contravened the SVP statute by conducting a mental evaluation without probable cause and then denied him his right to counsel during this evaluation.

III. The record does not show Strand voluntarily waived his constitutional rights by submitting to the mental evaluation

According to the majority, even if the State lacked statutory authority under chapter 71.09 RCW to conduct the mental examination, there is no error here because Strand voluntarily consented to the exam. However, if Strand reasonably believed the examination was required by law, he equally believed he could not lawfully refuse. If he had no known right to refuse, then any consent was involuntary and invalid. The Court of Appeals agreed with the State and held Strand consented to the examination. However, the factual record does not

support that conclusion.

To waive a constitutional right, the waiver must be intentional and the right must be known. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938). To be valid, the consent must be made knowingly, intelligently, and voluntarily. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Moreover, to be knowing, intelligent, and voluntary, the State must show the individual understood he had the ability to refuse consent without repercussion. *See State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927 (1998). Here, the State failed to carry its burden to show Strand's alleged consent to the exam was valid, as there is no signed consent form in the record nor any other corroboration beyond the psychologist's report's hearsay assertion Strand was informed of the consequences and agreed.

Strand argues due process prohibits the admission of any involuntary statements in an SVP hearing, and the trial court erred by admitting the statements he made to the psychologist without first determining if they were voluntary.

An individual has due process rights in a SVP hearing, notwithstanding its civil nature. *Young*, 122 Wn.2d at 26. The Ninth Circuit Court of Appeals has held the admission of coerced statements in a civil trial violates an individual's due process rights. *Bong Youn Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir.

1960); *see also United States v. Alderete-Deras*, 743 F.2d 645, 647 (9th Cir. 1984). Although *Choy* involved a deportation hearing, it applies where the hearing results in the complete deprivation of liberty as does an SVP hearing. Thus, the admission of coerced statements in an SVP hearing violates the defendant's due process rights.

The United States Supreme Court has held an individual's due process protection against the use of a coerced confession required the use of procedures "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Jackson v. Denno*, 378 U.S. 368, 391, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The Court further held that where a defendant had not received such a voluntariness hearing, the conviction which relied upon the statements must be reversed. *Id.* The United States Supreme Court has held due process requires a full hearing on the voluntariness of an admission before admitting that statement. We must do no less.

Therefore, we should at least remand to the trial court for a determination of whether Strand knowingly, intelligently, and voluntarily consented to the examination with full knowledge of his right to refuse without negative repercussion and his right to have an attorney advise him and accompany him to the evaluation.

IV. The unauthorized mental evaluation is a manifest error affecting a constitutional right

The State argues that even if it lacked authority to conduct the mental health examination, Strand's failure to object at trial to the evaluation, or to the admission of the psychologist's findings, failed to preserve the error. However, a party may raise an issue for the first time in an appellate court if it is a "manifest error affecting a constitutional right." RAP 2.5(a). As aforementioned, Strand contends the mental evaluation violated his due process rights, which include his right to counsel. He further argues that even if the examination does not violate a constitutional right, the court should exercise its discretion and consider the issue nonetheless. RAP 2.5(a) ("The appellate court *may* refuse to review any claim of error . . . ." (emphasis added)).

"Errors are 'manifest' for purposes of RAP 2.5(a)(3) when they have '"practical and identifiable consequences in the trial of the case."'" *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) (quoting *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999))). As Strand properly argues, the error here had several identifiable consequences in his trial. The improper examination was used to support the initial probable cause finding, and without it there was little evidence linking him to the prior uncharged allegations of molestation. Because the

examination was not authorized by statute and denied Strand his statutory right to counsel, the State violated Strand's constitutionally protected due process rights. Thus, the unauthorized examination was a manifest error affecting Strand's constitutional rights.

CONCLUSION

We should hold the SVP statute does not authorize a mental examination of an individual before the State has demonstrated probable cause to commit the individual, and any such premature examination constitutes a violation of the statute and hence of due process. Moreover because the State conducted a mental evaluation in violation of Strand's right to counsel, the examination violated Strand's due process rights in this respect as well. At the very least we should remand for the trial court to determine whether Strand voluntarily, knowingly, and intelligently waived his statutory and due process rights and consented to the examination. I find no implication in the record, however, that Strand was advised of his right to counsel, which should be dispositive in his favor. We should further hold coerced statements are inadmissible in an SVP hearing; and when in doubt as to whether statements have been coerced, a trial court must hold a voluntariness hearing. If the trial court finds Strand did not knowingly waive his rights, then the psychologist's evaluation and any related

findings and testimony must be suppressed in both the probable cause hearing and the trial.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Debra L. Stephens

Justice Tom Chambers